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In The Supreme Court Of The United States

October Term 1991

CORAL CONSTRUCTION COMPANY and OREGON COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

Petitioners,

v.

KING COUNTY, WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 5, 1991

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit erred in ordering the federal district court on remand to take into account post-enactment evidence (never placed before or considered by the enacting legislative body) in reconsidering the constitutionality of a county minority set-aside ordinance, found to be unconstitutional under this Court's decision in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989)?

2. Whether an ordinance found by the Court of Appeals to be overbroad on its face under *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), may, by judicially narrowing its reach, be utilized to deny petitioner Coral Construction Company damages for the racial discrimination it suffered in the competitive bidding process?

LIST OF INTERESTED PARTIES

Those parties listed in the caption, and no others, were parties to the proceedings in the Ninth Circuit Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Coral Construction Company and Oregon Columbia Chapter of the Associated General Contractors of America, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on August 8, 1991.

OPINIONS BELOW

The Ninth Cicruit's opinion is reported at 941 F.2d 910 (9th Cir. 1991) and is reproduced in the Appendix to this petition at A3-51. The district court

opinion is reported at 729 F. Supp. 734 (W.D. Wash. 1989) and is reproduced in the Appendix at A52-67. The ordinance under review, King County, Wash., Ordinance 8937 (May 1, 1989), codified as King County Code Chapter 4.18 (6-89), is reproduced at A68-124.

JURISDICTION

The petitioners brought this action in United States District Court for the Western District of Washington pursuant to §§ 1331, 1343(a)(3) and (4). The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on August 8, 1991. *See* A1. The instant petition for writ of certiorari has been timely filed in accordance with Rule 13 of the Rules of this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const., Amend. XIV, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981 Equal Rights Under the Law

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, taxes, licenses and exactions of every kind, and to no other.

42 U.S.C. § 1983 · Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In the wake of this Court's decision in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), King County, Washington (which encompasses the City of Seattle) hastily reviewed and reenacted a 1981 ordinance that had granted a preference to minority-owned and women-owned business enterprises (WBEs and MBEs) in competition for County construction contracts. *See* King County, Wash., Ordinance 8937 (May 1, 1989), codified as King County Code Chapter 4.18 (6-89). (A67). ("Ordinance").

The Ordinance extends two types of contracting preferences. If the County contract is under $10,000, the bid of an MBE or WBE is preferred over the lower bid of any other firm as long as the latter is not more than 5 percent below the bid that the MBE or WBE submits. *Id.* at § 4.18.060 A. 1. (A103-04). If the County contract exceeds $10,000, the successful bidder must use MBEs and WBEs to perform prescribed percentages of the contract work. *Id.* at § 4.18.060 A. 2.[1] (A105-07). The 5 percent bid prefer-

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[1] The County's director of its department of executive administration will establish an MBE and a WBE percentage for each contract "based on the extent of subcontracting opportunities presented by the contract and the availability of minority and women's business enterprises qualified to perform such subcontracting work." *Id.* at § 4.18.060 A. 2. a. (A105). Annual utilization goals for five categories of county contracts must also be set. *Id.* at § 4.18.030 A. (A95). Individual contract utilization goals (continued...)

ence may be utilized on these larger contracts--as it was here--if the County contracting officials determine that the bid preference is a "more feasible method of achieving" their annual utilization goals. *Id.* at § 4.18.060 C (A108).[2]

This case arose out of a County contract for the installation of guardrail. Three responsive bids were submitted. Petitioner Coral Construction Company, an Oregon corporation with a branch office in King County, submitted the low bid of $178,100. *Coral Const. Co. v. King County*, 941 F.2d 910, 914 (9th Cir. 1991) (A6). However, the County extended a 5 percent bid preference to Dirt & Aggregate Interchange, Inc. ("Dirt and Aggregate"), an MBE also based in Oregon, which had submitted a bid of $185,153.50 and decided to award the contract to Dirt and Aggregate on that basis. *Id.*

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[1](...continued)
may be higher or lower than the annual utilization goals. *Id.* at § 4.18.060 A. 2. a (A106).

[2] Set-aside levels may be reduced, or waived in certain circumstances. *Id.* at §§ 4.18.060 B. 1. (A107) and 4.18.070 (A110). Grounds for reduction or waiver include infeasibility because of contract requirements to meet the goals, unavailability of qualified MBEs or WBEs despite diligent search, or that MBE or WBE bids "exceed competitive levels beyond amounts which can be attributed to cover costs inflated by the present effects of discrimination." *Id.* at § 4.18.060 B. 1. c. (A108). *See also id.* at § 4.18.070 A. 5. (A111).

Petitioners Coral Construction and the Oregon Columbia Chapter of the Associated General Contractors of America, Inc., brought this suit in the United States District Court for the Western District of Washington, alleging that the preference program, on its face and as applied to Coral, violates the Equal Protection Clause of the U.S. Constitution, and 42 U.S.C. §§ 1981 and 1983. Coral requested damages, injunctive and declaratory relief, and attorneys' fees.

Upon cross-motions for summary judgment, the district court upheld the preference program. *Coral Const. Co. v. King County*, 729 F. Supp. 734, 740 (W.D. Wash. 1989) (A76). After the decision, the County awarded the contract to Dirt & Aggregate.

On appeal, the Ninth Circuit affirmed the district court's ruling on the WBE preference (*Coral Const. Co.*, 941 F.2d at 932-33) (A56-58), but reversed its ruling on the MBE preference. Relying on *Croson*, the Ninth Circuit found that King County had failed to establish a "compelling interest" in its MBE program at the time of enactment. The Court of Appeals noted that the "anecdotal" evidence of racial and ethnic discrimination cited by the County fell well short of establishing "a systemic pattern of discrimination necessary for the adoption of an affirmative action plan." *Id.* at 919 (A19). The County Council had before it no "statistical data in support of the County's MBE program." *Id.* at 918 (A17). The appellate court concluded that "strict scrutiny demands a fuller story." It added that "[n]ot enough has been told so far to meet King County's burden that its program passes

the 'compelling government interest' requirement." *Id.* at 919 (A20).

The court below then remanded the case to the district court, directing it to review additional evidence that was never placed before nor considered by the County Council in making the decision to reenact the ordinance in 1989, and on that basis to decide whether the ordinance could be supported by a compelling interest. The post-enactment evidence included, but was not necessarily limited to, two studies completed in January and July of 1990 (*i.e.*, the Perkins Coie Consultant Study and the Washington Consulting Group Study), which examine MBE and WBE participation in County procurement. (Neither study was considered below. *Id.* at 919-20 n.10. (A20-21).)

The court of appeals also found that the MBE program is not "narrowly tailored." The Ordinance provides a preference to minority businesses that have not been discriminated against "in the particular geographical areas in which they operate." King County, Wash., Code § 4.18.010 S (A89). The court concluded: "This definition is overly broad. Since the County's interest is limited to the eradication of discrimination within King County, the only question that the County may ask is whether a business has been discriminated against *in King County*." *Coral Const. Co.*, 941 F.2d at 925 (emphasis in original) (A36).

Again, however, the circuit court denied relief. Instead, it remanded the case to the district court for an inquiry into "whether this violation entitles Coral Construction to an award of damages. . . ." *Id.* at 926

(A39). It explained that "the record does not indicate whether Coral Construction lost its bid to a business which King County should not have considered." *Id.*[3]

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW ERRED IN ORDERING THE DISTRICT COURT ON REMAND TO TAKE INTO ACCOUNT POST-ENACTMENT EVIDENCE NEVER PRESENTED TO OR CONSIDERED BY THE ENACTING LEGISLATURE AS THE BASIS FOR REEVALUATING THE CONSTITUTIONALITY OF THE COUNTY'S MINORITY PREFERENCE ORDINANCE

This case presents an important question involving the proper role of federal courts in reviewing state and local legislative decisions found to be constitutionally wanting on the strength of the evidence before the legislative body at the time of enactment. Here, a County ordinance setting forth a minority preference program for County construction projects was held to be unconstitutional, because an insufficient showing of discrimination in the County's construction contracting market had been made to the

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[3] The ordinance was amended again in 1990 after the district court's opinion. *Id.* at 915 (A7). The court of appeals declined to consider the amendment, and ruled that the amendment did not moot Coral Construction's demand for damages, *id.* at 927-28 n.16 (A43) (*citing Croson*, 488 U.S. at 478 n.1), and for injunction and declaratory relief. *Id.*

County Council. *See id.* at 919 (A20). Nonetheless, the Ninth Circuit denied relief. Instead, it remanded the case to the district court to receive and evaluate post-enactment evidence unavailable to the County Council when the Ordinance was reenacted in May of 1989, and to decide independently whether that new evidence establishes a remedial need for such an ordinance--in short, to substitute the court's judgment as to the need for, and proper scope of, a county ordinance based on newly developed evidence.

This Court, in *Croson*, insisted that race-based ordinances of this kind must be compelled to survive constitutional scrutiny. 488 U.S. at 469. To meet the exacting standard applicable to such legislation, it is incumbent on the legislative body to demonstrate an evidentiary basis that racial discrimination exists and persists in the relevant geographic market and that alternative remedial measures to eliminate it have not been effective. *Id.* at 504, 507. Strict scrutiny review constrains the legislative body to act only when it can show that it "is pursuing a goal important enough to warrant use of a highly suspect tool" and only in a way that demonstrably "fit[s]" the "compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.*, 488 U.S. at 493 (Opinion of O'Connor, J., plurality opinion).

Such a showing concededly could not be made by the King County Council in the present case. Rather than returning the issue to the Council for reconsideration based on additional, new evidence, the court below assigned that peculiarly legislative

function to the federal district court. Moreover, its remand order gave the Ordinance's admittedly overbroad geographic coverage a judicially invented narrow construction that limited its reach to King County.[4]

The errors are fundamental and require plenary review by this Court. A federal court has neither the power nor the proficiency to exercise the legislative functions of a state legislature. *See Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982); *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472, 482 (1973); *see also Joseph Skilken & Co. v. City of Toledo*, 528 F.2d 867, 881 (6th Cir. 1975) *vacated and remanded*, 429 U.S. 1068 (1977).[5] This is not to suggest that the district court in this case is incapable of evaluating the later

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[4] The Ninth Circuit directed petitioner on remand to show that the successful minority contractor had, in the past, worked in King County in order to recover damages. *See Coral Const. Co.*, 941 F.2d at 925 (A37). But petitioner is already entitled to damages, on the facts established, since the entire ordinance failed constitutional scrutiny. *Id.* at 919, 926 (A20, A39). *See* discussion *infra* at pp. 19-23.

[5] The decision in *Joseph Skilken & Co.* was vacated and remanded by the U.S. Supreme Court "for further consideration in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Hills v. Gautreaux*, 425 U.S. 284 (1976). Upon remand, the Sixth Circuit adhered to its decision. *Joseph Skilken & Co. v. City of Toledo*, 558 F.2d 350 (6th Cir.), *cert. denied*, 434 U.S. 985 (1977).

developed studies that have been offered below as relevant to the discrimination issue. That and other evidence, along with responses or rebuttal from petitioners may--if made part of the legislative record--require exacting judicial scrutiny at some future date.

But the Ninth Circuit's remand order puts the judicial cart before the legislative horse. Under *Croson*, 488 U.S. at 504-05, it is the legislative "findings" that determine the constitutionality of an ordinance seeking to classify by race--not *post hoc* judicial "findings" arrived at independently on the basis of evidence never considered by the legislators at the time of the ordinance's enactment. Our federal judicial system is composed of courts of limited jurisdiction. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). Constitutionally, they are confined to resolving "cases" or "controversies." U.S. Const., Art. III, Sec. 2. Accordingly, the evidence and arguments that become the record for decision are case-particular and party-specific. Necessarily, the broader policy considerations and wider public participation that distinguish legislative debates from judicial argument cannot be fully brought to bear in the courtroom setting. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330, n.12 (1985) (noting legislature better at amassing and evaluating data on factual issues).

The federal district court, in short, is particularly ill-suited to try to predict what King County Council's legislative response might be if challenged to revisit its 1989 ordinance in light of newly developed studies or other evidence, together with whatever critiques or

responses might be offered in rebuttal. Whether the same ordinance would emerge, or one drawn more narrowly or more expansively, necessarily remains an open question. It is, however, a question that must be answered in the first instance in the legislative arena, not--as the remand order maintains--in the federal district courts which are without authority to fashion legislation, particularly legislation at the state or local levels. *See e.g. Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976); *United States v. Reese*, 92 U.S. 214, 221 (1876); *and see James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439, 2451 (1991) (Scalia J., joined by Marshall and Blackmun, JJ., concurring) ("the judicial power is . . . the power 'to say what the law is,' *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803), not the power to change it.").

Were the Ninth Circuit dealing here with an Act of Congress, the separation of powers doctrine would bar such a remand order. *See Aptheker v. Secretary of State*, 378 U.S. 500, 515-16 (1964); *see also Buckley v. Valeo*, 424 U.S. 1, 119 (1976) (separation of powers "at the heart of the constitution"). The fact that a county ordinance is involved gives the federal judiciary no greater license to "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). Indeed, the generally accepted view is that in such circumstances the federal courts have even less excuse for judicial legerdemain. *See generally Freedman v. Maryland*, 380

U.S. 51, 60 (1965) (it is for the state to decide "how or whether" to create proper procedural safeguards).

To suggest otherwise flies in the face of basic notions of federalism on which this country is founded. *See Gregory v. Ashcroft*, ___ U.S. ___, 111 S.Ct. 2395, 2399 (1991) ("states retain substantial sovereignty under our constitutional system"). It is one thing for the federal courts to evaluate a challenge to a local ordinance on constitutional grounds; that is done repeatedly. *See e.g., Croson*, 488 U.S. at 511; *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Levitt*, 413 U.S. at 479. It is quite another--having determined the ordinance cannot pass constitutional muster (*Coral Const. Co.*, 431 F.2d at 926 (A39))--to assign to the federal judicial branch the uniquely legislative function of receiving, evaluating and making policy judgments on newly developed evidence not previously before the local legislative body, in an attempt to shore up the ordinance's constitutional infirmities. Courts cannot and do not enjoy the full play of open debate that informs legislative determinations. *See Gwin, White & Prince v. Henneford*, 305 U.S. 434, 449 (1939) (Black, J., dissenting) (calling for "a broad and deliberate legislative investigation--which no court can make . . ."). That which may suggest a compelling need for a racial preference within the confines of a particular court dispute could become far less compelling with the opportunity of others uninvolved in the "case or controversy" to offer other evidence to the County Council in rebuttal.

It is, therefore, the *legislative* "findings" which this Court held in *Croson* to be of paramount importance in discerning whether there exists the requisite predicate for a set-aside program based on race. 488 U.S. at 500. "[W]hen a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals." *Id.* "Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Id.* at 510 (O'Connor, J., plurality opinion). For a federal court to usurp that local prerogative--or, more accurately, that local responsibility--disserves both the Supreme Court precedent and basic federalism.[6]

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[6] This Court recognized the importance of legislative findings well before *Croson*. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) ("a public employer like the Board must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted.") (Powell, J., plurality opinion). The Eighth Circuit stated the point most succinctly in *Valentine v. Smith*, 654 F.2d 503, 508 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981), where it concluded:

> "Because the justification for race-conscious affirmative action is remedying the effects of

(continued...)

The Ninth Circuit's error signals a Circuit split that requires resolution by this Court. In *Contractors Association of Eastern Pennsylvania v. City of Philadelphia, et al.*, ___ F.2d __ (3d Cir. 1991) 1991 U.S. App. Lexis 22718, the Third Circuit Court of Appeals entered a similar remand order to permit additional discovery of evidence that had allegedly been available, but admittedly had not been before the City Council of Philadelphia at the time it enacted a racial preference program.[7] The Sixth Circuit, by contrast, in *Michigan*

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[6](...continued)
past discrimination, a predicate for the remedy is that qualified persons make findings of past discrimination before the plan is implemented. Absent findings of past discrimination, courts cannot ascertain that the purpose of the affirmative action is legitimate. Such findings enable courts to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action. Likewise, a court can determine that the remedy substantially relates to its purpose only if it is certain that the persons shaping and implementing the plan understood the nature and extent of the past discriminatory practice."

[7] The Court of Appeals declined to decide whether such extra-legislative evidence regarding discrimination in the City's construction market would be material proof of legislative purpose, leaving that question open for the district court. ___ F.2d at ___, n.7, 1991 U.S. App. Lexis 22718 at 20, 21 n.7.

Road Builders Ass'n v. Milliken, 834 F.2d 583, 590-94 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989), confined its review to the legislative record as compiled *before* enactment of remedial legislation that classifies along racial lines.[8] The Sixth Circuit's decision comports with *Croson*; the Ninth Circuit's decision below, and the Third Circuit's similar ruling do not.

Nor has the Ninth Circuit provided a persuasive basis for departing from the *Croson* precedent. The suggested "dilemma" facing King County--on the assumption that discrimination was the standard operating procedure in the construction industry and

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[8] Tension among various district court opinions also suggests that Supreme Court guidance is needed on this point. In *Harrison v. Burrowes*, 743 F. Supp. 977, 1000 n.23 (N.D.N.Y. 1990), the court suggested *Croson* permits the use of post-enactment evidence. Pre-*Croson* cases also hold that evidence not before the legislature may be used to prove discrimination. *Ohio Contractors Ass'n v. Economic Development Administration*, 452 F. Supp. 1013, 1022 (S.D. Ohio 1977), *aff'd*, 580 F.2d 213 (6th Cir. 1978); *Rhode Island Chapter, Assoc. Gen. Contractors v. Kreps*, 450 F. Supp. 338, 355 (D.R.I. 1978). By contrast, in *Cone Corp. v. Hillsborough County*, 730 F. Supp. 1568, 1569 (M.D. Fla.), *rev'd*, 908 F.2d 908, *cert. denied*, ___ U.S. ___, 111 S.Ct. 516 (1990), review was confined to the legislative record, with the court declining to consider post-enactment evidence. *See also American Subcontractors Ass'n, Georgia Chapter, Inc. v. City of Atlanta*, 259 Ga. 14, 376 S.E.2d 662, 665 n.6 (1989) (same); *F. Buddie Contracting Company v. City of Elyria*, ___ F. Supp. ___, (N.D. Ohio 1991) 1991 U.S. Dist. Lexis 13115 (1991) (same).

that, without some statutory protection, the County could be held vicariously liable for such discrimination--is no "dilemma" at all. The facts of this case belie the assumption of systemic discrimination. The County denies that *it* has unlawfully discriminated in awarding contracts. *See* Ordinance, § 4.18.005 B (A79). Moreover, both the State of Washington and King County have anti-discrimination laws that already reach discriminatory conduct. *See* Rev. Code of Washington, Chapter 49.60, and King County Code Chapter 12.16. So, too, does the federal government. *See* 42 U.S.C. § 1981 (barring racial discrimination in the "making and enforcing of contracts"). King County remains free to discipline any of its own employees who discriminate against MBEs in the contract bid process, and could have enacted other race-neutral measures, if necessary, to address any other problem--even as it debated the propriety and need for racial preferences. Thus, the County faced no real exposure to liability, and properly should have resolved this issue through the legislative process. Indeed, chances are that the County Council could, if compelling facts existed, pass an acceptable law more rapidly than a final resolution would emerge, after all appeals, from the courts.

The Ninth Circuit's second justification for its remand order is equally wanting. 941 F.2d at 921. (A24) The court below endeavored to use this Court's decisions in *Arlington Heights*, 429 U.S. at 270 n.21, and *Mount Healthy City School District v. Doyle*, 429 U.S. 274, 285-86 (1977), as support for its decision to direct the district court to extend its constitutional scrutiny

beyond the four corners of the ordinance and its legislative history. But *Arlington Heights* and *Mount Healthy* are inapposite. The inquiry in those cases was directed towards the motives of the government actors *at the time they acted.* Since there was in each case evidence that the motives for the action taken were mixed--*i.e.*, that both racial and non-racial considerations were at work--the Court permitted the government actors to make an evidentiary showing that the decision made would have been the same in the absence of any unlawful motives. *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989).

The instant action is not a "mixed motive" case, however. The legislators' "motives" are not under scrutiny. Rather, the Ninth Circuit's inquiry concerns matters never before the legislators at the time they acted; indeed, the studies in question did not even exist at the time. It is thus clear that the remand order is concerned not with whether the County Council acted with proper or improper motives, but whether there exists outside the legislative record an independent basis for enactment of a race-based remedial set-aside measure.

Neither *Arlington Heights* nor *Mount Healthy* assigns that responsibility to the courts. *See Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985); *Regents of University of California v. Bakke*, 438 U.S. 265, 289, 320 nn.27, 54 (1978) (Powell, J., concurring). Whether the County can establish a compelling interest for enactment of a racial set-aside program remains a peculiarly legislative matter to be resolved at the county level on the strength of council "findings." *See*

Croson, 488 U.S. at 504-05. The Ninth Circuit's contrary ruling is reversible error.

II. THE COURT BELOW ERRED IN HOLDING THAT AN UNCONSTITUTIONALLY OVER-BROAD ORDINANCE MAY, BY JUDICIAL NARROWING, BE UTILIZED TO DENY PETITIONER DAMAGES FOR RACIAL DISCRIMINATION SUFFERED IN THE COMPETITIVE BIDDING PROCESS

The Ninth Circuit also found that the King County ordinance is not "narrowly tailored," because it gives a racial preference to contractors who have never even sought to work in the King County market. The court below correctly held that the Fourteenth Amendment does not, under any circumstances, allow King County to give a racial preference to MBEs never "victimized by discrimination within King County." *Coral Const. Co.*, 941 F.2d at 925 (A36).

Having held the Ordinance to be unconstitutionally overbroad, the court should have found Coral entitled to an award of damages, pursuant to 42 U.S.C. §§ 1983 and 1981 and attorney fees pursuant to 42 U.S.C. § 1988. Instead, the court remanded the case holding that Coral must first prove that it "lost its bid to a business which King County should not have considered" (*Coral Const. Co.*, 941 F.2d at 926, 927 (A39, A40-41))--*i.e.* that the successful MBE had not previously been discriminated against in King County.

In the process, the court wrongly assumed that it had the discretion to disregard the County Council's drafting of the Ordinance. In substance, the court

rewrote the Ordinance in much narrower terms.[9] Coral was denied the guardrail contract--notwithstanding its low bid--because of the race of its owners. The court held the County's defense--its racial preference Ordinance--to be defective. The damage has been done. To allow King County to avoid the consequences of the unconstitutional enactment through a judicial narrowing of the Ordinance goes

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[9] The definition of "Minority Business" in King County Ordinance § 4.18.010 S. (A77), reads as follows:

> "'Minority Business,' means a business certified by the Office of Minority and Women's Businesses of the State of Washington as a minority business enterprise which is legitimately owned and controlled by a minority person or persons as defined in this section. The director of the department of executive administration is authorized to determine that specific racial groups have not been discriminated against in their ownership and operation of particular trades or areas of business or *in the particular geographical areas in which they operate.* The director may exclude such businesses from consideration as "minority businesses" under this chapter, in connection with contracts involving such trades or areas of business, as provided in Section 4.18.080 of this chapter."

The italicized language was found on its face to give a preference to contractors who may have experienced no discrimination in King County. 941 F.2d at 925 (A36).

well beyond merely giving the Ordinance a saving construction.

There is no ambiguity on the coverage question. The ordinance, which incorporated the statewide MBE certification process, cannot realistically be interpreted as applicable only to past participants in the King County market. *See* n.9 *supra*. Such a result can be accomplished only by judicial legerdemain, not an available means for seeking to achieve such an end. *See e.g., Heckler v. Mathews*, 465 U.S. 728, 741 (1984) (a court may construe a statute to save its constitutionality, but cannot "usurp the policymaking and legislative functions of duly elected representatives"). Thus, the proper--indeed only[10]--course available to the Ninth Circuit was to declare the Ordinance unconstitutional (*Aptheker v. Secretary of State*, 378 U.S. at 515), and to remand for the sole purpose of determining the amount of the damages due Coral.

This second error in the remand order is essentially the same as the lower court's first error in remanding to consider after-developed evidence. The

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[10] Severance is unavailable as a method of salvaging an overbroad statute, at least when deleting language in the defective section (4.18.010 S.) cannot rectify the overbreadth. *See e.g., National Advertising Company v. Town of Niagra*, 942 F.2d 145 (2d. Cir. 1991) (rejecting district court's attempt to save portions of billboard statute by excision); *Eubanks v. Wilkinson*, 937 F.2d 1118 (6th Cir. 1991) (remanding to district court to determine if minor's consent provision could be severed).

courts are no more empowered to reconfigure an ordinance's reach, so as to provide for coverage distinctly different from the sweep of the legislators' pen, than they are permitted to create "legislative history" out of evidence neither before, nor considered by, the enacting legislative body. These are not functions to be assumed by an overreaching judiciary, no matter how well intended its motives. These functions are the province of the elected legislative bodies, whose job it is to weigh the various policy considerations and craft laws responsive to public needs and concerns within constitutional guidelines.[11] *See United States v. Robel*, 389 U.S. 258, 267 (1967); *Freedman*, 380 U.S. at 60; *Hill v. Wallace*, 259 U.S. 44, 70 (1922); *and see* pp. 10-12, *supra*.

There is particular reason to adhere to these lines of responsibility in the instant case, since it is a *federal* court interfering with a *local* ordinance. As already indicated (*see* pp. 12-13, *supra*), the venerated principle of federalism cautions against such judicial intrusiveness. *See National Advertising Company*, 942 F.2d at ___, 1991 U.S. App. Lexis 19008, 19 (1991) (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491,

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[11] This Court's prior decisions mandate a two-part process to sustain a race conscious preference. The legislature must first identify and measure the prior harm, and then it must fashion an appropriate remedy "narrowly tailored" to the harm. *Croson*, 488 U.S. at 507; *Wygant*, 476 U.S. at 277, 280 (Powell, J., plurality opinion); *see also Valentine*, 654 F.2d at 508. In the end, the Ninth Circuit assigned both of these functions to the judiciary.

508 (1985) (O'Connor, J., concurring)); *see also Hynes*, 425 U.S. at 622 (declining to limit city ordinance); *Smith v. Goguen*, 415 U.S. 566, 575, (1974) (declining to narrow state statute absent state court interpretation); *Welsh v. United States*, 398 U.S. 333, 363 n.15 (1970) (noting Court's limited discretion in setting state policy).[12]

CONCLUSION

The Court of Appeals erred in directing the district court to reconsider the constitutionality of a local racial preference ordinance, in the light of post-enactment evidence never considered by the legislature when the set-aside program was originally enacted. That error was compounded by instructions on remand for the district court to consider petitioner's claim for damages under the provisions of

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[12] The court below misread *Mount Healthy City School District v. Doyle*, 429 U.S. 274 (1977), as supporting its remand to the district court for consideration of damages under the more "narrowly tailored" coverage crafted by the Ninth Circuit. *Coral Const. Co.*, 941 F.2d at 921. In *Bakke*, 438 U.S. at 320 n.54, Justice Powell made clear that to apply the *Mount Healthy* principle in such circumstances where, as here, there exists no evidence that the legislative decision was dependent on "mixed motives" (both good and bad)--*see, e.g.*, pp. 18-19, *supra*--would be to engage in a "fictitious recasting of past conduct." The relevant question is whether the petitioner suffered injury (*i.e.*, denial of a county contract) due to race, and not whether King County could have drawn a preference program in a narrowly tailored, constitutional manner.

an ordinance that exists only in the court's mind. This Court's ruling in *Croson* assigns fact finding and narrow tailoring to the legislative bodies that enact race conscious legislative programs. To blink at this Court's prior allocation of responsibility undercuts its prior decisions, runs counter to traditional understandings of federalism, breaks with other circuit and district courts and sows seeds of confusion regarding when, where and by whom the lines of racial legislation should be drawn, if at all. The issue is an important and timely one that deserves plenary review by this Court.

Accordingly, we urge that the instant petition for a writ of certiorari be granted and this matter be heard by the full Court.

Respectfully submitted,

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